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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS,

Petitioners,

v.

MANAGEMENT ASSISTANCE, INC., GENESIS ONE COMPUTER CORPORATION, ROBERT W. BEREND, RAYMOND P. KURSHAN AND CHARLES F. TRAYER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

QUESTION ONE:

SHOULD THE DEFENDANTS' PROXY SUPPLEMENT HAVE BEEN ALLOWED OR CONSIDERED BY THE COURTS BELOW FOR ANY PURPOSE IN VIEW OF THE FOLLOWING FACTS?

(1) EVEN THOUGH THE OMISSIONS SUED UPON WERE POINTED OUT TO THEM BEFORE SUIT WAS BROUGHT, DEFENDANTS DELIBERATELY WITHHELD THE MODIFICATION OF THEIR PROXY UNTIL SUIT HAD ACTUALLY BEEN COMMENCED AND WOULD NOT HAVE AMENDED AT ALL HAD THIS LAWSUIT BEEN ABANDONED.

(2) THE SUPPLEMENT WAS CIRCULATED FOR THE EXPRESS PURPOSE OF CREATING A DEFENSE TO THIS LAWSUIT, BUT SUCH FACT WAS NOT DISCLOSED TO THE PLAINTIFF CLASS.

(3) TO THE CONTRARY, THE SUPPLEMENT REPRESENTED TO THE PLAINTIFFS THAT THE WITHIN LAWSUIT WAS "WITHOUT MERIT" AND THAT THE SUPPLEMENT WAS ONLY BEING CIRCULATED PURSUANT TO A NON-EXISTENT POLICY OF DEFENDANTS TO KEEP SHAREHOLDERS "FULLY INFORMED."

(4) THE SUPPLEMENT WAS CAREFULLY DRAFTED TO CONVEY THE IMPRESSION THAT ALL DISCLOSURES DEMANDED BY THE COMPLAINT HAD BEEN MADE; WHEREAS THEY HAD NOT BEEN.

(5) IN VIEW OF THE FACT THAT CIRCULATION OF THE SUPPLEMENT WAS WITHHELD TILL THE

VERY LAST MINUTE WHEN MOST OF THE VOTES EVER TO BE CAST HAD ALREADY BEEN PUT INTO THE MAIL BACK TO DEFENDANTS AND DEFENDANTS DID NOT ASK FOR A NEW VOTE.

(6) IN OTHER WORDS, PETITIONERS ASK IF IT WAS PROPER TO PLACE THE ONUS OF CHANGING THEIR VOTES UPON THE OFFENDED SHAREHOLDERS OR SHOULD THE SOLICITATION HAVE ASKED FOR A COMPLETE NEW VOTE.

QUESTION TWO:

EITHER IN VIEW OF THE FOREGOING MATTERS OR AS AN INDEPENDENT PROPOSITION, SHOULD THE SUPPLEMENT NOT HAVE BEEN DISREGARDED B E C A U S E DEFENDANTS INTENTIONALLY BYPASSED THE COURT AND MAILED OUT THE SUPPLEMENT WHILE SUIT WAS PENDING WITHOUT NOTICE TO THE OPPOSING PARTY OR CONSENT OF THE COURT? WAS SUCH MEASURE NOT REQUIRED TO ASSURE JUDICIAL CONTROL OVER A PENDING LAWSUIT?

QUESTION THREE:

INASMUCH AS VIRTUALLY ALL OF THE ASSETS OF THE ONLY SUBSIDIARY FROM WHICH PETITIONING CLASS OF SHAREHOLDERS COULD RECEIVE ITS $39.60 CONTINGENT PAYMENT WAS COMPOSED OF "DUE FROM AFFILIATED COMPANIES" AND SUCH TRANSACTION WAS NOT NEGOTIATED ON AN ARM'S LENGTH BASIS AND LITTLE OR NO COMPENSATION WAS CONTRACTED OR PAID, AND INASMUCH AS SUCH ARRANGEMENT WAS NOT

DISCLOSED AT ALL IN THE ORIGINAL PROXY SOLICITATION AND WAS DISCERNABLE ONLY PARTIALLY (AND THEN ONLY TO THE PERCEIVING EYE) IN THE SUPPLEMENT, WERE DEFENDANTS NOT IN VIOLATION OF BOTH FEDERAL AND STATE LAW? AT A MINIMUM, SHOULD THE DISTRICT COURT NOT HAVE RELEGATED TO THE STATE COURTS ALL STATE LAW QUESTIONS PERTAINING TO SUCH $17 MILLION ITEM RATHER THAN ASSESS A $6,000 PENALTY AGAINST PLAINTIFFS FOR SUGGESTING ON REHEARING THAT THE COURT DO SO?

QUESTION FOUR:

(1) IS SUMMARY JUDGMENT A PROPER VEHICLE TO DETERMINE THE TRUE PURPOSE OF A PROXY SOLICITATION WHERE THAT MATTER IS IN ISSUE?

(2) IS A TRIAL ON THE MERITS NOT INDICATED WHERE QUESTIONS OF INTENT, PURPOSE AND MOTIVE MUST BE DECIDED?

(3) IN THE PRESENT CASE WHEREIN PETITIONERS HAVE CHARGED THAT THE TRUE PURPOSE OF THE REDEMPTION WAS TO FREEZE-OUT PREFERRED SHAREHOLDERS FROM PARTICIPATION IN THE ANTICIPATED BENEFITS OF A NEW VENTURE TO WHICH THE COMPANY WAS HEAVILY COMMITTING ITSELF, WAS IT PROPER TO DECIDE WITHOUT TRIAL ON THE MERITS THAT SUCH OBJECTIVE WAS MERELY A MATTER OF UNDERLYING MOTIVATION OF WHICH THE SECURITIES LAWS REQUIRE NO DISCLOSURE?

QUESTION FIVE:

WERE THE ATTORNEYS FOR PLAINTIFFS SO DERELICT IN THE PROSECUTION OF THE CASE THAT FORFEITURE OF THE ENTIRE CAUSE OF ACTION WAS WARRANTED? PARTICULARLY, INASMUCH AS THIS CASE HAD ALREADY (ON MOTION OF RESPONDENTS) BEEN CERTIFIED AS A CLASS ACTION THEREBY INVOLVING THE CLAIMS OF 2,000 SHAREHOLDERS AGGREGATING $33 MILLION, SHOULD NOT AND COULD NOT THE COURT HAVE ENFORCED THE DILIGENT PROSECUTION OF THE CASE THROUGH LESS ONEROUS MEANS?

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed. Petitioners wre plaintiffs and counter-defendants in the trial court. Petitioners were appellants and cross-appellees in the court of appeals. The case was docketed in the US District Court for the Southern District of New York on August 1, 1978 as No. 78 CIV 3516 (CES) bearing the same name as in this Court. The case was docketed in the United States Court of Appeals for the Second Circuit as No. 81-7515, 7535 & 7 and the case name was the same as in this Court.

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IN THE

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OCTOBER TERM, 1982

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The informal opinion of the Second Circuit, text not to be published, affirmance to be tabulated at —— F.2d ——, filed January 7, 1982, is in the petitioners' appendix (PA 1).[1] The memorandum decision of the District Court (PA 4), filed May 4, 1981, is reported at 81 CCH FSec

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[1]In referring to the proceedings below, petitioners will employ the following abbreviations: (PA) — Petitioners' Appendix attached to this petition; (A) — (As a suffix, e.g. (1101A)) — Joint Appendix, Court of Appeals; (R) — Record in the US District Court. Such record bears no pagination. It will be referred to by record reference (R) plus title and file date or by reference to the item number on the Clerk's docket (1A) plus internal paging e.g. (R 14/3) is Clerk's docket item 14, page 3, being Memorandum Decision.

Unless otherwise indicated, all emphasis has been supplied.

¶98,245 but not in the Federal Supplement. Said Court's memorandum decision on rehearing (PA 17), not to be published, was filed June 11, 1981.

JURISDICTION

The judgment of the Court of Appeals (PA 19) was dated and entered January 7, 1982. A timely filed petition for rehearing was denied by order dated and entered February 24, 1982 (PA 20). On May 14, 1982, Mr. Justice Marshall extended the time to petition for certiorari to June 24, 1982. On June 15, 1982, Mr. Justice Marshall granted further extention to July 24, 1982. The jurisdiction of the Supreme Court is invoked under 28 USC §1254(1).

STATUTES AND RULES INVOLVED

SEC Ex Act, §14(a), 15 USC, §78n(a). *Proxies; tender offers.* (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

SEC Ex Act, §10(b), 15 USC, §78j—*Manipulative and deceptive devices.* It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 CFR (78 ed.) §240.10b-5 *Employment of manipulative and deceptive devices.* It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 CFR (78 ed.) §240.14a-9 *False or misleading statements.* (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

STATEMENT OF THE CASE

Jurisdiction of the District Court was pleaded under the *Securities Exchange Act*, §27, 15 USC §78aa. Pendent jurisdiction was pleaded as to state law claims as well as diversity jurisdiction.

Space limits preclude complete discussion of error in the findings of the District Court (PA 4). Throughout, petitioners will point out presently significant disagreements and present omitted facts.

Fighting its way back from near collapse, MAI reorganized in 1971 and 1974. Class petitioners, paying $1,000 for a debenture in 1967 and voting for both reorganizations wound up with 20 C shares of $50; total face value, $1,000. However, 80% ($40 per share) was contingent on the cash flow of a single subsidiary, GOCC, and also subject to assignment of cash flow to a banking syndicate (the overhanging debt). The dividend was virtually nill.[2] (9, 10, 366-75, 386-402, 446-51A).

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[2]The Court's adoption of respondents' description of the $40 as a "dividend" (PA 6) is a misnomer. As between original obligor and obligee, the $40 was repayment of capital and recoupment of investment. C shares provided for a true dividend (earnings distribution) of $.01 annually, if declared (never done) (375-81A).

The complaint charges that the assets of GOCC were syphoned off, primarily to Basic Four Corp. which turned out to be extremely profitable. As the overhanging debt approached payout (when significant payments would commence accruing to petitioners) new lines of credit opened up to MAI causing respondents to commit to new ventures. (PA 22-32, 50-1; 16-8, 20-4, 1033-1100A; R. 52/47-51). But, C share restrictions gave exclusive marketing rights to GOCC mandating that 75% of the cash flow be applied to the $40 payment (PA 37; 97A). Meanwhile, MAI's refusal to distribute financial information concerning GOCC had depressed C share prices (13A; R. 52/13-4, 46), the creating opportunity and motivation to propound a coerced redemption for $10.50; only 50 cents above the guaranteed payment of $10 (37A). Charles Ben Howell, a Texas lawyer (610A) presently serving as a state district judge, 1 *TX Leg. Dir.* (82 ed.) 153 a 10 year MAI investor voted as requested in 1971 and 1974, but this time he brought suit (602-3, 630-45A).

Respondents have unceasingly attacked petitioner Howell and his attorney claiming bad faith,[8] incompetence

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[8]The July 12, 1978 letter (PA 63; see also PA 17) merely invited settlement negotiations. What a chilling effect the opinion (PA 17) would create if it imposed penalties merely for inquiring if the defendant desired to discuss settlement. The statement to the Circuit that Judge Howell offered not to sue in return for a private settlement to himself (fn. 9) is not referenced and is false. Respondents have no idea what counsel had in mind because they responded with a curt telephone call threatening to make any suit moot by last minute supplementation of the proxy (which has been done and countenanced). Later, after receiving an advance copy of the complaint with request for waiver of service, Mr. Walpin telephoned Judge Howell personally on Saturday, July 29, 1978, surreptitiously recording the conversation (all demands for the tape have been refused) and suggested that a private settlement was available in return for omitting class action pleadings and his prayer for a pre-

Fn. cont.

and sloth. Example: respondents devoted 72% of their statement in the Circuit (PA 56) to impugnment of the opposition. That court refused argument and silently rejected the cross-appeal but did the same to Judge Howell's appeal of a $6,000 penalty for filing a 15 page (brief and affidavit inclusive; amounting to $400 per page) unargued motion for rehearing asking, *inter alia*, that pendent claims be dismissed without prejudice (PA 4 ¶7, 17-9; R. 69, 70).

Contentions that the filing of suit was delayed "until the last minute to heighten settlement pressure," that the District Court motion to reconsider denial of an injunction was harassment because the Court lost jurisdiction when appeal was noticed, and that the ultimate non-suit of the injunction appeal proves bad faith are all unsupported.[4]

Petitioners urge the counterclaim itself was a bad faith pleading calculated to prevent us from associating with experienced New York securities lawyers. Respondents

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liminary injunction (905-19A). Offer rejected: the complaint contained class pleas and an injunction was diligently pursued.

We likewise fail to see how the Court read any motives from the September 1, 1978 letter (PA 64) stating the "simplest method of settling the case would be to ask **the Court's permission** to non-suit" before certification (PA 64). Obviously, filing of the counterclaim brought settlement discussions to a halt.

[4]Respondents (and possibly the Courts) have lost sight that most private securities actions are David and Goliath litigation, where defendant's assets exceed plaintiff's 1000 to 1. Here, a small town general practitioner (626-30A) is pitted against a cadre of skilled and experienced specialists from the securities section of the 69th largest law firm in the country, **81-2 Lawyers Almanac 7.**

Respondents took months to prepare the proxy whereas petitioners' counsel had less than 30 days. It is remarkable that it was all done. Denial of the injunction put pressure on counsel to act immediately. He failed to note that it is not permissible to simultaneously appeal and move for rehearing. After Judge Van Graafeiland (who eventually served on the affirmance panel) declined to postpone the meeting, the appeal became pointless and non-suit was the only recourse (283A; R. 34).

knew that in order to move forward expeditiously, petitioners required additional counsel, who would be required to work on contingency, and that there had been several recent New York cases, assessing penalties for baseless actions in bad faith. Respondents' bad faith is proved by their rush to the courthouse.[5]

Judge Howell's deposition was the subject of more trial tactics.[6] In retrospect, class certification appears as further questionable trial tactics.[7] Exactly 15 days after completion,

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[5]While repeatedly criticizing Judge Howell for bringing this suit of plainly urgent nature without being able to immediately document all allegations, respondents counterclaimed three days after the injunction hearing, before obtaining Judge Howell's deposition, with no discovery and even before their answer was prepared. Why the rush? Tactics; an obvious attempt to make other lawyers wary of participation. Respondents apparently succeeded; the short pocketbook side of the case was unable to recruit additional attorneys (183, 543A; R. 7, 70/6).

[6]He came to New York for the injunction hearing. Respondents purposely waited two days until he departed town to demand a deposition 8 days later. Judge Howell moved for travel expense or several months' postponement to fit the matter with other proceedings. To save expense, he also asked for the concurrent deposition of respondent Kurshan. Both requests were denied and within 8 days Judge Howell appeared and deposed (543A; R. 8, 9, 17, 27).

[7]Being assured that Judge Howell had no spy within their organization, respondents decided to shoot for summary judgment before any claims could be verified, but they also desired to bar subsequent lawsuits. They notified petitioners that they would not oppose certification. Negotiations and discussions concerning the class definition and notice procedures ensued. They became restive; quick action was essential. Within 30 days, respondents filed their own motion to certify the class, an unheard proposition. The point as to questionable trial tactics is that they had Judge Howell's deposition in hand when they moved to certify and intended to make his lack of inside information the centerpiece of an MSJ already planned. (211, 230, 238, 237, 238A; R. 25, 26, 28, 31, 32, 33).

Respondents opposed the Kurshan deposition arguing that if certification was denied, the expense burden would force termination raising the possibility that this executive's time might be wasted.

Fn. cont.

petitioners were greeted with an MSJ and supporting documents aggregating 304 pages, together with a demand for response the day after Christmas, two weeks hence, an impossible demand[5] (266-543A; R. 47). Having briefed the case, petitioners did not rest. During March, 1980 they filed motions, briefs and affidavits opposing summary judgment and asking that a ruling be held in abeyance pending discovery. On March 31, a request for production, 21 pages in length asking 70 categories of documents, was filed[6] (965A, R. 53 thru 60).

The argument was weighty. Discretion precluded substantial expenditures of time or money before certification (202, 206A).

Certification granted, attorney Pattison, working alone, undertook circulating class notices; the task having been made particularly time consuming by the terms of the Court's order. The work was completed and court approval of notification was secured (241A; R. 44/endamt. 69/Aft 2).

[6]Petitioners were granted extensions until February 25, 1980. Petitioners then filed a 54 page opposing brief and requested two more weeks to complete briefing. A clerk gave notice by telephone that no additional time would be allowed. Several points still unbriefed, petitioners' attorney continued to labor. On March 7, 1980, the 85th day after service of respondents' opus, petitioners presented a completed brief, incorporating their previous brief and covering the entire case, which brief contained 19 issues, almost all separately briefed and running 141 pages. The time was not inordinate in view of the task. Petitioners' motion for leave to file was denied. However, the Court states that it considered the brief, anyhow (PA 7; 957, 992A; R. 52, 53/Notice, 53/Aft. 54).

[5]Respondents provided nothing; they superficially objected (988A) and further objected that they should not be required to produce before ruling on MSJ "sub judice, * * * none of the documents sought is necessary * * * to oppose said motion and all * * * requests will become moot if * * * granted" (989A).

Petitioners' motion for discovery time was also "sub judice;" a motion to compel would have added little; petitioners anticipated in view of the striking of their brief that no further opposition to the MSJ would be entertained, that a ruling would be forthcoming at any time; and that the Court would hold respondents to their untenable position, as declared. Counsel (reasonably to our view) deferred the burden of 1,500 miles travel to enforce discovery.

The Court did not rule immediately. It held a hearing in November, 1980, and expressed concern with four specific areas in which petitioners asserted discovery was needed (PA 22; 1033A; R. 58/8-11). The hearing was concluded by giving *respondents* leave to file a further brief; "Mr. Pattison, if * * * I need something further from you, I will let you know" (PA 32).

For 14 months, petitioners anticipated a ruling daily until May 4, 1981 when the Court not only denied discovery but granted summary judgment. Petitioners filed for rehearing suggesting that the Court's handling and long deliberation had delayed discovery (R. 69, 70/5-9). We cannot say that the $6,000 penalty was, in part, for impertinence, but respondents certainly urged those grounds on the Court (R. 72/17-22).

Petitioners regret this diversion from the merits but the Courts below have made the conduct of Judge Howell and attorney Pattison into such an issue that discussion is compelled.

ONE & TWO: THE SUPPLEMENT MUST BE DISREGARDED

In reply to petitioners' letter of July 12, 1978, respondents dared petitioners to proceed stating that suit would be made moot by amendment.[10] On July 24, 1978, the proposed complaint was delivered to counsel (R. 7, Ex. A & B). Respondents were apprised of petitioners' objections but they withheld action lamely explaining to the Second Circuit that defendants "did not know [petitioners' allegations] with certainty" until two days prior to August 8 when they mailed the supplement (Dft. Br. 2 Cr. 33, fn. 40; 345A).[11]

There was no new proxy solicitation (118A). The document was framed as a letter to "Dear Shareholder" giving "reasons" why respondents considered this lawsuit to be invalid. The conclusion states (124A) that "The polls shall remain open eight additional days" (until August 18) giving shareholders an opportunity to vote or change their vote. Considering that shareholders were initially given 44 days, the 8 days (less several days mailing time) was painfully short.

Respondents deliberately waited until suit was filed

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[10]The strategy was obviously based upon tactics employed in **Abramson v. Nytronics**, 313 FS 519 (SD NY 70) where Mr. Walpin participated, but this record reflects sharp practice far exceeding that case.

[11]Respondents secured a two-fold advantage by deferring the supplement until the last minute: First, the closer to the originally declared meeting date, the more shareholders would already have mailed their proxy, giving defendants full advantage of human inertia and the common disaffinity to reconsider things already decided. August 6 being a Sunday, no one received the supplement until August 7 and outside of the New York area, delivery would have been on August 8 or August 9. By then, all but a few deadline hangers had already responded. The second advantage was trial tactics. Petitioners' counsel received no advice of the supplement until two hours before the injunction hearing and could not intelligibly respond.

but then rushed pell-mell to the mail prior to the injunction hearing with the obvious purpose of greeting the Court with *fait accompli* and so that objections from petitioners would come too late. How much more open; how much greater cooperation respondents could have exhibited by following the *Abramson* precedent wherein defendants, *at the injunction hearing* agreed to postpone for five weeks and issue a supplement "which they believed would meet the objections" stated. *Supra*, 522-3.

Summary Judgment Was Based Upon The Supplement: Respondents urged in the Circuit that the District Court had ruled that the original solicitation would support summary judgment, pointing to the Court's statement while comparing *Newgard v. Electro*, 76 CCH FSec¶95,805 (SD NY) that "here, * * *, there were no deliberate nor material omissions[13] from the initial proxy (PA 10), plus the statement that the supplement was "perhaps unnecessary" (PA 17) plus "we in no way consider plaintiff to be a prevailing party" (1123A). Our response: while the ruling lacks clarity, the supplement was extensively discussed.

Clearly, the Court was strongly persuaded by the midnight supplement.

If the Circuit had been in doubt as to the basis of the District Court's ruling, it would properly have remanded

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[13]It was plain error to require petitioners to prove "deliberate" proxy omissions. The registrant has the burden to cause solicitation to fully comply and make full and fair disclosure. Neither was the proper definition of materiality employed. **TSC v. Northway**, 426 U.S. 438, 449 (76) held an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.

> "Only if the established omissions ar so obviously * * * (unimportant) that reasonable minds cannot differ * * * is the ultimate issue of materiality appropriately resolved * * * by summary judgment." **Id.** 438.

for additional findings, but the Circuit resolved any question in petitioners' favor holding: "Judge Stewart * * * relied upon * * * the Supplemental Proxy * * *" (PA 3). The second leg of that ruling, that the reliance was "proper", was error, but the finding that the Trial Court did so rely is well supported. Additionally, the Court of Appeals itself clearly relied on the supplement and the Circuit's action is herein assigned as error.

The Supplement Was Deliberately Withheld: Respondents contend the Supplement was distributed "to save * * * the expense of litigation" (Dft. 2 Cr. Br. 31); a patent euphemism, inferentially admitting they were attempting to build a defense. The statement that they waited to find the contents of the complaint "with certainty" inferentially concedes that had suit been abandoned, there would have been no supplement.

In the District Court's view it matters not when material is distributed as long as it is received (PA 9). The Circuit apparently agreed (PA 3). The principle of "corporate therapeutics" has been overlooked. From the outset, management possesses the complete facts. The nature and extent of disclosure is primarily within its control. Full disclosure from the outset must be encouraged. Allowing a company to dash in with disclosures that should have been made in the first instance defeats the regulatory scheme. *Mills v. Autolite*, 396 U.S. 375 (70). *Studebaker v. Gittlin*, 360 F.2d 692, 697-698 (2-NY 66).

"Use of a solicitation that is materially misleading is itself a violation of law." *Mills*, supra, 383. A registrant whose material is questioned has a duty to act immediately if the challenge has validity. It may not wait to see if a lawsuit ensues. No lesser interpretation will foster the full disclosure principles of the Securities Acts.

The True Purpose of the Supplement Was Not Disclosed: Defendants would lose all credibility if they attempted to convince this or any other court that the true purpose of the supplement was other than to create a defense, and they have conceded as much.

Where, we ask, in the supplement, was this explained to the plaintiff shareholders? Having chosen to advise them of this lawsuit, respondents had the duty to make it plain that the purpose of the supplement was to create a defense. A fiduciary may not withhold material information. *Affiliated Utes v. United States*, 406 U.S. 128 (72). *Chris-Craft v. Piper*, 480 F.2d 341, 364 (2-NY 73) *rvsd. oth. gds*, 430 U.S. 1 (77).

The Purpose of the Supplement Was Falsified: Respondents went much further than mere advice of pendency. They prominently inserted three paragraphs beginning *"The Company believes that this action is totally without merit,"* [emphasis in the original], denying any false or misleading statement, claiming compliance with SEC rules and regulations and concluding "The Company is, *however*, sending you this letter consistent with *the Company's policy* to keep its shareholders *fully informed*" (PA 49).

The statement was patently false. Within 48 hours, the supplement was being argued in court as an injunction defense. Instead of a policy to keep shareholders "fully informed," respondents follow a policy of "tell only what you must." Instead of fostering higher standards of corporate accountability, the decision provides a handy tool for those who walk the brink of non-disclosure providing them a means to retrieve themselves, ex post facto, whenever their hand is called.

The defense of obviousness must be rejected. The primary purpose being the creation of a defense, it follows

that this is a case of false representation. A well established principle of general law declares gullibility of the victim is no defense to express fraud. Having elected to correspond with "Dear Shareholder" concerning the lawsuit, Chairman Kurshan had a fiduciary duty to tell both the truth and the whole truth; to disclose the true purpose of the letter. *SEC v. Parklane*, 558 F.2d 1083 (2-NW 77). Failing to do so, respondents should have been held to their declared purpose. The supplement should have been held inadmissible as a defense.

The Supplement Falsely Implied That the Complaint Had Been Fully and Fairly Summarized: This supplement, as always in the case of proxy solicitations, was meticulously drawn by a bevy of skilled executives, huddled with their lawyers and accountants; until every word was deemed to convey the proper impression; without an outright lie, for which there are stringent sanctions.

The "letter" states that it will not repeat plaintiffs' "subjective opinions," etc, and continues, "The Company is willing to disclose * * * the balance of the facts which the plaintiff claims were omitted or misrepresented" (PA 50).

"High standards of corporate ethics" obligated respondents to do as they represented, but clearly they did not fully and fairly meet the "balance" of the fact allegations. Petitioners filed with the District Court a list of 28 omitted specific fact pleadings (R. 52/76-80). Space restrictions limit us to examples. For instance, respondents advised the Courts below as follows: "The crux of plaintiff's claim was that the $10.50 redemption was less than the fair value of the C Stock * * *" (Df. 2 Cr. Br. 3; R. 47/11-13). Respondents were not nearly so frank with "Dear Shareholder." Nowhere is it disclosed that the complaint attacks the $10.50 mandatory redemption as unfair. All specific allega-

tions (12-24A) concerning unfair price are disregarded. "Dear Shareholder" was left to guess as to the "crux."

Where did they discuss the allegation that the financial statements in the proxy are of no assistance in determining the earnings and assets of GOCC because GOCC represented less than 20% of the consolidated entity? Where did they discuss the allegation that certified financial statements were omitted *even though reasonably available*? Where did they discuss the allegation that ever since the C shares were floated, respondents purposely omitted to distribute financial data relating thereto, *for the calculated objective of depressing market values*?

In short, the entire supplement was carefully constructed to illustrate the opening premise, "This action is totally without merit." If the supplement be compared to the complaint, it is obvious that any allegation casting doubt on the writer's premise was purposefully omitted or glossed over.

The supplement inferred a representation that the complaint had been reasonably summarized and fully answered. Inasmuch as it was not what it purported to be; inasmuch as it was calculated to mislead, it must be disregarded.

The Supplement Was Not Circulated Until the Last Minute: Regardless of the reasons, the supplement came too late to be effective. The vast majority of ballots ever cast were back in the mail before petitioner class could have received the supplement. After reading the originally expressed meeting date of August 10, shareholders had no hope of their vote being counted unless it was mailed by August 9 but the supplement could not have been received until August 7. In practice, no punctual shareholder

beyond the New York area received the supplement before his vote had been cast.[13]

Every lawyer knows the difficulty of persuading a Court to revise a decision once made. The situation in hand is comparable to a motion for new trial where the motion is delivered not to the tribunal but to the opposition, who is then permitted to argue reasons for denial whereas movant is never permitted to exhibit his motion or to appear and argue.[14] Timing assured that the supplement had no effect on the voting.

Complete Re-Solicitation Was Necessary: Registrants, being in control of the situation, must be induced to take care that their solicitations are adequate in the first instance. The statute and regulations are "remedial" and "prophylactic." *Mills v. Autolite, supra; TSC v. Northway, supra.* Re-solicitation was required in *Central Foundry v. Gondelman, supra*:

> "Placing the onus of obtaining restitution upon the misled stockholders is not here 'appropriate in the public interest' nor the relief best calculated 'for

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[13] "While this period (of delay in sending out the 'flyer') is not long * * * (in ordinary terms) it was of important significance * * * (to the proxy contest). The likelihood that the beneficial owners of the stock registered in the names of banks or brokers would receive the flyer in time to act thereon was problematical. That the * * * (shareholders residing beyond) the North Atlantic states, would even receive the 'flyer' in due time to act thereon was improbable; and as to the remaining stockholders the time for them to respond—at most five days—was unreasonably short, tantamount almost to depriving them of the opportunity to formulate and exercise an informed judgment." **Central Foundry v. Gondelman, 166 FS 429, 441-2 (SD NY 58).**

[14] "Coming so close to the * * * meeting date, the letter does not constitute timely notice * * * and cannot be an effective cure. * * * The requirement of affirmative action to change an initial commitment cannot as a practical matter produce the same corrective results as a new proxy." **Newguard v. Electro, supra.**

> the protection of investors.' The facts developed upon the hearings before this Court compel a holding that the proxies procured by the Committee are void. * * * Only thence will the stockholders be in the position before they acted in reliance upon the unlawful soliciting material." *Id.* 446-447.

As in *Gondelman*, none of the street name holders (those relying on banks and brokers to forward proxy material) could have received the supplement in time. The fact that August is the height of the vacation season is a consideration.

At the beginning, professional solicitors were paid $10,000 to contact petitioners and urge them to vote (PA 48). No one was similarly urged to consider the supplemental material. Many other cases have required a complete resolicitation. *Newguard v. Electro, supra; Dillon v. Berg*, 362 FS 1214 (DCDE 71), *affd. mem. op.* 453 F.2d 876 (3-DE 71); *Studebaker v. Allied*, 256 FS 173 (WDMI 76); *Union Pac. v. NW*, 226 FS 400 (NDIL 64); *Gladwin v. Medfield*, 540 F.2d 1266 (5-FL 76); *SEC v. May*, 229 F.2d 123 (2-NY 56) *affd.* 229 F.2d 123 (2-NY 56); *Berkman v. Rust*, 454 FS 787 (SDNY 78); *Willoughby v. Post*, 182 FS 496 (SDNY 60) and *Blanchette v. Providence*, 428 FS 347 (DCDE 77).[15]

Circumstantial evidence (the legalese equivalent of common sense) says that respondents, being advised by

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[15]Our case is miles apart from **Sonesta Intl. v. Wellington**, 483 F.2d 247 (2-NY 73) or **Corenco v. Schiavone**, 488 F.2d 207 (2-NY 73) where supplementation was **ordered** (emphasis). Presently, the supplement was circulated (1) behind the Court's back (2) for the purpose of creating a defense. We suggest those courts would have been wise to insist upon a look before the mailing, but that question is apart from the present one. Likewise, the opposition should have been given an advance look, but the point was waived by failing to object.

skilled consultants, considered the legal necessity (obviously, these fiduciaries pondered not concerning desirability or fairness) of a complete re-solicitation of proxies. On existing legal precedent, they gambled that the Court would not require re-solicitation, and, to this point, the gamble has paid off. The sustainer of respondents' deliberate choice to omit re-solicitation is again defeative of the statute.

It is not for us to say that re-solicitation must be imposed in every instance but we do urge that re-solicitation should be the rule, not the exception. This record does reflect trifling transgressions. The general rule must be that those who solicit in violation of the law, *Mills v. Autolite, supra*, may not retain the fruits of their infractions.[16]

The Court Was Deliberately By-Passed: Having chosen to defer supplementation unless and until suit was filed, there was only one way these corporate fiduciaries could have known "with certainty," that they were dealing

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[16]Respondents cannot claim expense as justification of the omission to re-solicit. The cost would be identical whether new and distinctive ballots or additional copies of old ballots be sent out, respondents choosing the latter (346-7A). Of course, if the shareholders were asked to re-submit their proxies, the solicitation company would desire another $10,000 for telephone canvassing, but the very absence of this extraordinary effort is a strong argument for voiding the supplement. Additionally, the $10,000 was nothing compared to the $33 million redemption price reduction sought to be imposed.

Re-solicitation would have required more time, but again, the fact that petitioner class was only given 7 days or less, after deducting round trip mailing time, to change their vote is an argument for avoidance. Further, what was the hurry? The so-called "reasons for proposed redemption" (38-41A) are tissue. "Flexibility" was the only reason found by the court (PA 6). Boiling away excess verbiage, the only solid reason stated was the possibility of operating economy from combined operations, but no combination was possible until payout of the overhanging debt; not then predicted to occur until July, 1980 (PA 26). Timing posed no problem whatever.

properly with their *cestuis*: by asking the Court to give prior approval to the contemplated supplement. Instead, defendants imposed their will, both upon those whom they were charged to protect and upon the Court.

(1) The complaint was pleaded as a class-action; every C shareholder was a putative opposing party represented by counsel. Respondents were negotiating with the opposing parties regarding a pending case without consent of Court or notice to opposing counsel. The class action mechanism does not constitute an exception to the rule forbidding such.

Defendants already had obtained counsel who had taken charge. The lawyers on both sides had engaged in preliminary negotiations. Most certainly, the "Dear Shareholder" letter was drafted and mailed in consultation with defense counsel. Counsel probably thought of the tactic. Certainly, they could not have written this letter on their own letterhead. It was equally improper for their clients to do so with consent (possibly at the suggestion of counsel).

(2) R. 23, FRCVP is urged as prohibiting such unilateral negotiation. The Court has a special duty to see that class members are adequately represented and no unfair advantage taken. *Re General Motors*, 594 F.2d 1106, 1124 (7-IL 79). It has frequently been so held between class members, named plaintiffs and plaintiff attorneys. One side of a lawsuit should not be forbidden to negotiate with the class and the other side left free. *Gulf Oil v. Bernard*, 452 U.S. 89 (81). In a securities action, either side desiring to so negotiate must be required to obtain advance consent so that the court will be in a position to see that all negotiations are fair.

On August 5, 1978, respondents declared to opposing

class members that the lawsuit, filed on behalf of the class being addressed, was "without merit." Opposing counsel of record, then acting for the entire class, had no opportunity to respond or advise as to the clients' best interest. Only respondents had a shareholder list. Prophylaxis demands that, R. 23 having been violated, the supplement must be disregarded.

(3) It is unlawful to solicit proxies without complying with the Securities Exchange Act and regulations. 15 USC §78n(a); 78j(b); 17 CFR §240.10b-5; §240.14a-9. There may be no solicitation without the imprimatur of the *proper* authority.

Like as not, a staff examiner did stamp the supplement, but respondents were confused as to the *proper* authority. The Court had assumed the SEC's jurisdiction. The Separation of Powers Doctrine prohibits administrative agencies from exercising jurisdiction over causes pending in Article III courts. *U.S. Const. Art. III* §§1, 2. When the Court stepped into the shoes of the SEC, the policy of the regulatory scheme was unchanged, but the *proper* authority to "pre-clear" supplemental solicitations was the Court."

Which authority is better equipped to pass upon a proxy dispute actually being litigated, the federal court or the routine review staff of the SEC? To ask the question is to answer it. Staff review is not an adversary proceedings and the SEC proxy clearance staff must yield to the

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[17]We think the Court took exclusive jurisdiction, but jurisdiction was, at least concurrent. Defendants had as high a duty to the Court as they had to the SEC; to-wit: obtain prior consent. The regulatory scheme made it mandatory that defendants have "pre-clearance" from each authority exercising jurisdiction. Any other interpretation gives the SEC greater power than the courts to deal with the res of a pending lawsuit.

expertize of the Courts.[15]

(4) Prior notice and the opportunity to be heard *before* action is taken are due process cornerstones of a case or controversy. With suit already pending, it would have been such a simple matter for respondents to ask permission to circulate a supplement. When respondents elected to act unilaterally, petitioners were deprived of important rights. Due Process prohibits a shifting of the burden of proof through ex parte action. *Armstrong v. Manzo*, 380 U.S. 25 (72). Respondents sought to cast upon petitioners the burden of proving unfairness of an accomplished fact. For such deprivals of constitutional dimension, the supplement must be declared void.

(5) Practice and procedure is largely judicial in origin. *Younger v. Harris*, 401 U.S. 37 (71) and numerous other cases are no more than statements of judicial policy. If the supplement was never cleared with the SEC, the Court would unhesitatingly declare it void. Does it comport with judicial policy to hold the SEC has a greater right regarding a pending lawsuit than the Court? We think not.

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[15]The fact that this is a securities case harmonizes **Gulf Oil v. Bernard**, supra. That **defendant** obtained an order restricting negotiations by named plaintiffs and plaintiffs' attorneys. An impermissible prior restraint was found. Presently, there can be no First Amendment issue unless the authority of the SEC itself be struck down. All we urge is that the Court assumed the powers of the SEC, which for years has required pre-clearance of proxy solicitations. Further, petitioners do not seek to prevent communications between registrant and shareholder. They may communicate at will but may not invoke ex parte negotiations had pendente lite as a defense.

Bernard is further distinguishable in that communications by plaintiffs rather than by defendants were in issue. That defendant apparently presumed the continued right to negotiate as it chose. The unfairness of having one party in a position to influence class members with the other party unable to do so is, in our estimation, at the core of the **Bernard** decision. The identical fundamental unfairness exists here making Bernard substantial authority for petitioners' position.

Commencing with the seminal decision of *JI Case Co. v. Borak*, 377 U.S. 426 (64) the Supreme Court has held the courts should be alert to provide the remedies necessary to effectuate the congressional purpose. A registrant, being the only active participant in the litigation with the facility to do so, must not be left free to unilaterally negotiate with the plaintiff-class *pendente lite* without consent of court or notice to counsel.

THREE: THE $17 MILLION ITEM PRECLUDES SUMMARY JUDGMENT

A registrant making a recommendation in a proxy solicitation is obligated to present sufficient facts to enable the shareholder to weigh its validity. For C shareholders, the original solicitation was waste paper; 42 pages of financials pertaining *only to MAI*. The midnight supplement contained a meager three pages (PA 52-4) of unaudited condensed statements.[19] They state "Due from affiliated companies . . . $16,803,781" (PA 54), but there is no explanation of this 75.48% of GOCC assets, the sole source of plaintiffs' $40 contingent payment.

At oral argument defense counsel replied "No, Your Honor" when asked if this item was explained in the supplement (PA 22). Respondents described the item as an "account receivable" in a supplemental brief filed thereafter and claimed that the item was outstanding prior to the 1974 re-organization (1049-53A) a fact not disclosed in either proxy. Respondents' position in oral argument and ensuing brief was that the $17 million item was not material in that repayment would not constitute cash flow to GOCC

[19]The complaint charges that audited statements of GOCC can be prepared at a minimum expense (13A). For summary judgment, the uncontroverted statement stands admitted. The failure to controvert was pointed out to Court and counsel 14 months prior to summary judgment but no attempt was made to alter the situation. (R. 52/128).

(PA 22-4). Petitioners argued that having three-quarters of GOCC's assets in a non-earning status, if such was the case, would be material (PA 29-31).

Finally, before the Second Circuit, respondents stated that the item had started off in 1974 as $13,514,648 and had never yielded any return to plaintiff-class (Dft. 2 Cr. Br. 25).[20]

Interest at 8% from the July 9, 1974 offering date through the September 25, 1978 redemption date amounts to $5,416,722. On November 26, 1980 respondents stated to the District Court: "The only major addition to this *account receivable* was in 1976 * * *" (1052A). Apparently $3,289,-133 was diverted from GOCC's productive assets during 1976. Interest from September 30, 1976 through September 25, 1978 is $567,249 for a total of $5,983,971, being $5.35 per share of diverted income. By July 24, 1982, the $5.35 had increased to $7.37.

There Was a 1978 Securities Violation: It has now been admitted that 75% of GOCC's assets were non-earning. A vast change in profitability and cash flow would result if the status of the $17 million item were changed. If the reasonable shareholder in considering the $10.50 redemption might have considered the matter important, a fact issue of material non-disclosure existed.

The non-earning asset was totally unmentioned in the June 27, 1978 solicitation, a clear infraction of the law. *Mills v. Autolite*, supra. In the wake of an unlawful solicita-

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[20]Interest is not the proper test. Bankers holding notes guaranteeing a fixed rate of return plus principal payments at a time certain, all secured by pledge of collateral are compensated with interest. Petitioners provided venture capital funds to affiliates and are entitled to pro-rata participation in the earnings generated. Rate of return is a matter to be decided after remand. Petitioners presently urge they are at least entitled to interest. The rate should not be less than 8%; the rate imposed upon petitioners in calculating the present value of C shares (PA 41).

tion, simple disclosure of the nature which originally might have sufficed is unacceptable. *Central Foundry v. Gondelman, supra.* Remedial disclosure is demanded, *Dillon v. Berg, supra,* sufficient to bring home to those relying thereon that the original disclosure was insufficient. *Dillon v. Berg, supra.*

The midnight supplement fails the ordinary test of disclosure. The fact that 17/22 of GOCC's assets were in the hands of affiliated companies was finally brought to light, but there was not one word as to how long the situation had existed. Neither does the shirt-tail summary of operations sufficiently confirm the non-earning nature of the asset. The schedule reflects heavy interest expense. Particularly in a condensed statement, it is an acceptable accounting practice to show interest as a combined net item. The summary further reflects substantial "miscellaneous" income which could have been payment for use of the $17 million item. There is a fact issue whether the reasonable investor would have so apprehended. "It is not sufficient that overtones might have been picked up by sensitive antennae of investment analysts." *Gerstle v. Gamble,* 478 F.2d 1281, 1297 (2-NY 73).

There Was a 1974 Securities Violation: Petitioners have also alleged a 1974 Securities violation in the flotation of the C shares (29A).

As now admitted, a major portion of GOCC's assets was then composed of "Due from affiliated companies." MAI had no plans either to restore GOCC's capital or pay compensation for its use. MAI, primarily through its Basic Four subsidiary enjoyed unbounded prosperity during 1975-78 but respondents took no action to return the $17 million or pay for its use creating a fact issue as to intent in 1974. Serious issues of out-and-out securities fraud are present.

A fact issue having been raised by respondents' own statements, controverting affidavits are unnecessary. *Adickes v. Kress*, 398 U.S. 144, 159 (70). On summary judgment, all inferences "must be viewed in the light most favorable to * * * "the opposing party." *United States v. Diebold*, 369 U.S. 654 (62).

In view of the admissions concerning 1974, the imposition of punitive damages, as pleaded, is amply warranted.

There Was A State Law Securities Violation: Where more than one class of stock is outstanding, corporate officers have a separate fiduciary duty to each class. *Lachman v. Bell*, 353 FS 37 (SDNY 72); *Schwartz v. Marien*, 37 NY2d 487 (75); *Zahn v. Trans-America*, 162 F.2d 36 (3-DE 47); *Box v. Northrop*, 459 FS 540 (SDNY 78) *affd.*, 589 F.2d 609 (2-NY 79).

We think it clear that state law placed a duty upon the officers of MAI to bargain on behalf of the C shareholders for a fair return on GOCC's assets so that the contingent payment rights of C shareholders would be meaningful.

Respondents have a poor record as to fiduciary responsibility. *Diamond v. Oreamuno*, 248 N.E.2d 910 (NY AP 69) involved the peculations of a former chief executive. Respondent Kurshan was Oreamuno's lieutenant and took over as chairman and president when Oreamuno was forced out by scandal. The history of the $17 million item poses questions whether the officers and directors of MAI have learned any lessons.

Even though the complaint alleges pendent claims of waste, mismanagement and breach of fiduciary duty (25-28A), respondents urged that any claim relating to the $17 million "is not one for a proxy action or a securities action," and that the same "is not part of this action" (PA 23-28). Petitioner responded, "This is a pendent matter" (PA 31).

By supplemental brief, respondents urged: "Reference to pendent jurisdiction is inapposite because * * * [after dismissal] no federal cause of action will remain to which his state law claim * * * can be pendent." (1040A).

In its decision, the Court gave scant attention to state law claims prompting petitioners to file for rehearing urging "The state law issues have not been fully developed" and ask that the dismissal thereof without prejudice (R. 70/3-4) to which the Court responded by assessing a $6,000.00 penalty for a "frivolous" motion (1132-4, 1151A).

On appeal, respondents executed a 180 degree turn urging that the trial court *did* have jurisdiction to rule upon the pendent claims (Dft. 2 Cr. Br. 34-37) prompting the Circuit to declare the "claim is frivolous."

We do not argue with the fundamental proposition to the effect that jurisdiction is to be determined from the pleadings and once jurisdiction attaches, it continues. The principle of "Our Federalism" is involved declaring that state courts should be deferred to regarding state matters.

Whenever a case is disposed of in its early stages, federal courts should "ordinarily" relegate the state law issues to the state court. *United Mine Workers v. Gibbs*, 383 U.S. 715 (66). The petitioning class has not been provided a day in court on state claims. Preferably, the District Court should have retained jurisdiction and proceeded to trial, but at all costs, it should not have dismissed with prejudice in view of respondents' denials of the Court's jurisdiction and in view of the fact that the claims were not fully developed.

FOUR: PURPOSE AND INTENT ARE NOT SUMMARY JUDGMENT ISSUES

Petitioners contended in the lower courts that the within case is a classic squeeze-out or freeze-out; that the

real purpose behind the redemption was to prevent C shareholders from participating in a major expansion of the company's business then being planned.[21] Pursuant to SEC rules, the original solicitation contained three pages of supposed "Reasons for Proposed Redemption" (PA 38-41) of no substance. The courts below held in effect, that any such animus of respondents was, clearly and incontrovertibly, only a collateral consideration or an incidental motive citing *Rodman v. Grant*, 608 F.2d 64, 71 (2-NY 79).

Petitioners rely upon *SEC v. Parklane*, 558 F.2d 1083 (2-NY 77) holding that the true intents and purposes of control parties must be disclosed even if they do not directly bear upon the value of the security involved. The reason: Such information bears directly upon the validity of the recommendation given. If they have a special axe to grind, it must be disclosed. *Parklane* was approved in *Parklane v. Shore*, 439 U.S. 322 (79). Accord: *Gerstle v. Gamble, supra; Tanzer v. Haynie*, 405 FS 650 (SDNY 76).

Admittedly, there are many areas of the law (*e.g.* the criminal law) wherein purpose and intent are material issues whereas the law universally rejects inquiries as to motivation, either collateral or incidental. However, the distinction is, at best, a fine one.

Petitioners present an issue which was not considered in *Rodman* or *Parklane*. Both authorities agree that the

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[21] Plaintiffs presented the District Court with 11 items of circumstantial evidence indicating that respondents' purposes were not disclosed (R. 52/20) which cannot be repeated. Examples: the admission that ever since 1974, respondents purposedly omitted to distribute GOCC financial statements for the purpose of depressing the market; that in connection with this proxy solicitation, respondents omitted complete certified financial statements of GOCC which were reasonably available; and that respondents borrowed from banks at high interest rates to obtain the $10.50 redemption money whereas the C shares accrued nothing. The redemption did not make sound business sense except from a freeze-out standpoint. Also, see footnote 16.

state of mind of the issuer can become relevant in securities litigation. Petitioners urge that the issue is present here and the issues must be tried upon its merits. Our common law traditions do not permit trial by affidavit where the inference drawing function is involved.

As a general proposition, it is well established that purpose and intent are not matters for summary judgment. *Stonehill v. Security*, 68 FRD 24, 38 (SDNY 75); *Amer. Cyanamid v. Arden*, 331 FS 597, 606 (SDNY 71). See also *Fournier v. Canadian*, 512 F.2d 317 (2-VT 75) holding that summary judgment may not be used to try fact issues but may only determine if "there are fact issues to be tried". In *TSC v. Northway, supra*, 450, it was held that an issue may not be "appropriately resolved * * * by summary judgment" where reasonable minds might differ. See also *Perelman v. PA*, 432 FS 1298 (EDPA 77) (denying summary judgment: all doubts must be resolved in favor of the protected class).

As presented above, the reasons stated for the redemption are non-reasons. The heavy banking commitments which respondents made in order to accomplish this redemption simply could not justify any possible operating efficiencies generated. The failure to articulate significant reasons suggests that the true purpose was hidden. The petitioning class of C shareholders was entitled to a trial on the merits as to purpose and intent.

FIVE: THE FORFEITURE WAS IMPROPER

Mr. Justice Holmes once stated that the considerations in the judge's mind are often different from the reasons stated in his ruling. We believe the statement applies to the present case.

(1) By the nature of things, evidence in a securities

case lays in the enemy camp. If Judge Howell desired an injunction, he had to act quickly. Nevertheless, the District Court was greatly disturbed by the fact that witness Howell, at his deposition, taken within 3½ months after the original proxy mailing, was unable to fully document his allegations.

(2) Attorney Pattison does not claim perfection in the prosecution of the case. In mitigation, he would point out that he was hampered by distance limitations, by a shortage of expertise in securities litigation, and by personal problems (953-5; R. 69/Aft. 3-4). He was hampered in securing assistance and in proceeding by defense tactics. The Court contributed to his dilemma by failing to give any warnings, by failing to set a discovery schedule on cut-off date, by inferring in its March 18, 1980 ruling (957A) that no further summary judgment opposition would be allowed and by holding a motion for discovery time (961A) under advisement for 14 months and then denying it in connection with final judgment. Nevertheless, the Court was again greatly disturbed by counsel's failure to proceed with discovery at an earlier date.

(3) Judge Howell's "unsupported" allegations plus attorney Pattison's shortcomings in exercising discovery was the pervasive theme of the Court's decision. We are convinced that the Court was in a punitive frame of mind and that the summary judgment was primarily a forfeiture. Of course, "forfeiture" is a strong word which courts are reluctant to employ. For instance, courts often declare that rights have been "waived" for failure to timely object when the term "forfeited" is much more apt. In like vein, the Court cushioned its real grounds of forfeiture with other rulings that find little support either in the law or the record because it felt uncomfortable to simply declare the case forfeit and go no further. However, forfeiture was foremost in the Court's mind. Petitioners think that

the point was proved by the Court's strong reaction to the motion for rehearing wherein counsel suggested that the Court itself had delayed discovery (R. 70/5-7).

The theme of this issue, number five, is that the Court went too far. The penalty was not just $6,000. It amounted to millions, primarily assessed against innocent and unsuspecting persons, members of the plaintiff class.

Surely, the Court could have better controlled the situation. R. 23 FRCVP places upon the court an affirmative duty to monitor the adequacy of representation being received by members of the class at all stages. *Re: General Motors, supra* 1124. The Court below gave no warnings to counsel, set no schedules, made no recommendation that additional counsel be employed and possibly misled counsel by its own method of handling. Inasmuch as this is a securities case, the Court could have also asked for the SEC to investigate the merits or the adequacy of representation or even to intervene. Also available is the assessment of a penalty of the nature actually imposed (but without dismissal) and, as a next resort prior to dismissal, the dissolution of the class. *Alyeska Pipeline v. Wilderness,* 421 U.S. 240 (75); *Roadway Exp. v. Piper,* 447 U.S. 752 (80).

There is no indication that any of these available alternatives was considered. There wasn't even a hearing to determine if sanctions should be imposed. Instead, the entire case was forfeited without warning. The penalty is too great. The case must be remanded for consideration of reasonably available alternatives.

CONCLUSION

Certiorari to the Second Circuit should be granted.

Respectfully submitted,

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